

TANZANIA / JUDGMENT

petrofuel t limited vs bahdela company limited 2023 tzhccomd 225 20 july 2023

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TZHCCOMDDECIDED
20 July 2023

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 63 OF 2022 PETROFUEL (T) LIMITED.....
PLAINTIFF VERSUS BAHDELA COMPANY LIMITED..... DEFENDANT Date of
Last Order: 19/07/2023 Date of Ruling: 20/07/2023

RULING

MKEHA, J When the plaintiff's witness prayed to tender copies of computer generated invoices as evidence in court, whose authenticity is stated in an affidavit affirmed by one Mr. Satish Kumar, Mr. Godwin Mussa learned advocate for the defendant rose to object. According to the learned advocate, the affidavit regarding authenticity of the invoices sought to be tendered into evidence, had been deposed by a deponent who would not appear in court for purposes of cross examination. In view of the learned advocate, the deponent of the said affidavit belonged to the office of the plaintiff hence; competence of the plaintiff's witness to tender the purported unsettled 1 I Page invoices was at issue. The objection hereinabove was preferred under section 18 (2) (c) of the Electronic Transactions Act. In elaborating the objection further, Mr. Samson Mbamba learned advocate for the defendant, entertained a doubt whether it would be proper to rely upon an affidavit deposed by a person who would not attend court proceedings for reasons of ill health. In view of the learned advocate, the said invoices ought not be admitted. Mr. Stanslaus Ishengoma learned advocate for the plaintiff submitted in reply that, the objection was misconceived. In his considered view, under section 18 (4) of the Electronic Transactions Act it was not necessary for the deponent of the affidavit regarding authenticity of documents to appear in court for purposes of cross examination. When Mr. Mbamba learned advocate rose to rejoin, he was insistent that, the affidavit of authenticity ought to be considered as part of the evidence. The learned advocate was emphatic that, the witness could not rely upon the affidavit of authenticity deposed by a witness who was not in court. Mr. Mussa learned advocate, in a further rejoinder insisted that, just as the witness was a part to the plaintiff's suit, so it was on part of the deponent of the affidavit regarding authenticity. 2 | Page It was the defendant's position that the invoices were inadmissible because of the manner in which its originator was identified. The objection was preferred under section 18 (2) (c) of the Electronic Transactions Act. To appreciate the gist of the objection, it is imperative to reproduce the provision of the law under which the

objection was preferred. Section 18

- (2) of the Electronic Transactions Act provides as hereunder: "In determining admissibility and evidential weight of a data message, the following shall be considered- fa) the reliability of the manner in which the data message was generated, stored or communicated;
- (b) the reliability of the manner in which the integrity of the data message was maintained;
- (c) the manner in which the originator was identified', and
- (d) any other factor that may be relevant in assessing the weight of evidence." Whereas the introductory words of sub section (2) of section 18 of the Electronic Transactions Act suggest that admissibility of an electronic record is determined under that provision of the law, sub section (4) of the said provision reads as hereunder: "For purposes of determining whether an electronic record is admissible under this section, evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic 3 | Page records are to be recorded or stored, with regard to the type of business or endeavours that used, recorded or stored the electronic record and the nature and purpose of the electronic record." Close reading of the two sub sections namely, sub - section (2) and (4) of section 18 of the Electronic Transactions Act reveals that, there is a conflict between the two sub - sections of the same section of the law. The conflict is to the following effect. On one hand, the law suggests that admissibility of an electronic record is determined under sub - section (2). On the other hand, the same law suggests that admissibility of an electronic record is determined under sub - section (4). It is trite that, the provisions of one section of a statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. The same rule applies in regard to sub-sections of a section. Rules of statutory interpretation require that, the sub-sections be read as parts of an integral whole and as being interdependent and that, an attempt should always be made in construing them to reconcile them if it is reasonably possible to do so to avoid repugnancy. The principle is, if a special provision is made on a certain matter, that matter is excluded from the general provision. Read: Principles of Statutory Interpretation by Justice G. P. Singh, 8th Edition, at pages 123 to 124. 4 | Page Upon re- reading section 18 (2) (a) to (d) of the Electronic Transactions Act in whole, it is my finding that, reliability of the manner in which the data message was generated, stored or communicated, reliability of the manner in which the integrity of the data message was maintained, the manner in which the originator of the data message was identified and any other factor that may be relevant in assessing the weight of evidence, are the factors to be taken into account in assessing the evidential weight to be attached to any data message after it has been admitted as evidence in court. Paragraph (d) of sub-section (2) of section 18 of the Electronic Transactions Act uses the following words: "any other factor that may be relevant in assessing the weight of evidence", preceded by the word "and" In terms of section 10 of the Interpretation of Laws Act, a reference in a written law by number, letter or by number and letter to two or more portions of a written law as it appears in section 18(2) (a) to (d) of the Electronic Transaction Act, should be construed as including the portion described by the reference first mentioned and

the portion described by the reference last mentioned. As a matter of fact, the law provides specifically that, admissibility of an electronic record under the Electronic Transactions Act is determined under section 18 (4) of the Act. In terms of the said provision of the law as 5 | Page reproduced hereinabove, in determining whether an electronic record is admissible or not, an evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavours that used, recorded or stored the electronic record and the nature and purpose of the electronic record. Therefore, by enacting sub-section (4), which is specific on how admissibility of an electronic record is to be determined, the legislature excluded the aspect of determination of admissibility of an electronic record under sub-section (2). It goes without saying therefore that, the provision of the law cited in preferring the objection, was not a proper one. In the objection preferred, the learned advocates for the defendant did not question relevance of the unsettled invoices in determining the facts in issue but authenticity of the invoices. Under section 18 (3) (a) of the Electronic Transactions Act, the authenticity of an electronic records system in which an electronic record is recorded or stored should, in the absence of evidence to the contrary be presumed where there is evidence that supports a finding that at all material times the computer system or other similar device was operating properly or if it was not the fact of its not operating properly did not affect the integrity of an electronic record and 6 | Page there are no other reasonable grounds on which to doubt the authenticity of the electronic records system. In paragraph 3 of the affidavit regarding authenticity of the disputed invoices that was filed in court, it was deposed that, "on due dates from 18th January, 2016 to 19th February, 2016 the plaintiff supplied and delivered fuel to the defendant as per a (sic) their oral and implied and partly written business agreement, to that effect the plaintiff issued Computer Generated Invoices to the defendant and whereof for purposes of this suit the invoices are annexed and collectively marked as Annexure P-1 collectively..... " Then in paragraph 7 of the said affidavit, the deponent deposed that, "the said computer generated invoice (sic), were printed in duplicate via our office printer and laptop, which were/ are functioning properly without any defect.... " Against the averments reproduced hereinabove, the court received no evidence to the contrary as envisaged under sub-section 3 (a) of section 18 of the Electronic Transactions Act. Neither did the defendant express her intention to cross examine the deponent of the affidavit regarding authenticity of the disputed invoices at any time before a prayer for tendering the invoices into evidence was made. The fact that the said affidavit was filed in court 7 | Page on 05th June 2023 and thereafter served upon the defendant was not denied by the defendant's advocates. In terms of section 18 (3) (b) and (c) of the Electronic Transactions Act, in addition to paragraph (a) of the said section, the authenticity of an electronic records system in which an electronic record is recorded or stored should also in the absence of evidence to the contrary, be presumed in either of the following situations: where it is established that the electronic record was recorded or stored by a part to the proceedings who is adverse in interest to the part seeking to introduce it or where it is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a part to the

proceedings and who did not record or store it under the control of the part seeking to introduce the record. Here at home, authenticity has always been a bone of contention in courts. See: EMMANUEL GODFREY MASONGA VS. EDWARD FRANZ MWALONGO, THE RETURNING OFFICER OF NJOMBE TOWNSHIP COUNCIL AND THE ATTORNEY GENERAL, Miscellaneous Civil Cause No. 6 of 2015, HCT, (Iringa Registry) at Njombe, (Unreported). Elsewhere in other jurisdictions, before an electronic record is admitted into evidence, matters pertaining to relevance, veracity and authenticity of the electronic 8 | Page record sought to be admitted have to be ascertained. In this regard, I am persuaded by an American case law to wit, LORRANE VS. MARKEL AMERICAN INSURANCE COMPANY 214 FRD 534 (D Md.2007) in which the following were listed to be the factors to be considered:

- Is the information relevant?
- Is it authentic?
- Is it hearsay?
- Is it original or if it is a duplicate, is there admissible secondary evidence to support it?
- Does its probative value survive the test of unfair prejudice? As hinted earlier in this ruling, the preferred objection did not challenge relevance of the disputed invoices to the determination of the facts in issue. The objection attempted to challenge the affidavit regarding authenticity of the invoices. I have endeavoured to demonstrate that the court received no evidence contrary to what had been deposed in the affidavit filed in court and served upon the defendant, regarding authenticity of the disputed invoices. The objectors did not address the court on how the documents sought to be tendered were in conflict with sub-section 4 of section 18 of the Electronic Transactions Act. For the foregoing reasoning, I hold the disputed invoices to be admissible. The same are collectively admitted as Exhibit P3. 9 | Page DATED at DAR ES SALAAM this 20th day of JULY 2023. JUDGE 20/07/2023 Court: Ruling is delivered in Chambers in the presence of Mr. Anoop Kumar, the plaintiff's witness, Messrs Ishengoma, Mosha and Mtaki learned advocates for the plaintiff and Messrs Samson Mbamba and Godwin Mussa learned advocates for the defendant. JUDGE 20/07/2023 10 | P a g e

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